Trojan Mining and Processing, Inc. *and* United Mine Workers of America, District 17, Subdistrict 4. Case 9–CA–29243

December 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On a charge filed by the Union on January 21, 1992, and an amended charge filed on February 25, 1992, the General Counsel issued a complaint on March 6, 1992, against Trojan Mining and Processing, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to continue in effect all the terms and conditions of its collective-bargaining agreement with the Union, i.e., by refusing to provide its employees with health insurance since about October 1991, and, since December 20, 1991, by refusing to provide its employees with the vacation benefits and sickness and accident benefits. These actions occurred without the Union's consent, and they pertain to mandatory subjects of bargaining. Thereafter, the Respondent filed a timely answer admitting in part and denying in part the allegations in the complaint. The Respondent further asserted that its financial condition and business circumstances justified its actions and that it filed a Chapter 11 bankruptcy petition in United States for the Eastern District of Kentucky.

On June 22, 1992, the Respondent, the General Counsel, and the Union filed a stipulation of facts and joint motion to transfer these proceedings directly to the Board. The parties agree that the charge, complaint, answer, and stipulation, with attached exhibits, shall constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties further agree that the stipulation has been entered into by them for the purpose of the above-entitled matters only. The parties waive a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and agree to submit this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision and Order.

On July 29, 1992, the Deputy Executive Secretary, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel filed a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and brief, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Trojan Mining and Processing, Inc., a Kentucky corporation, is engaged in the mining and processing of coal at its facility in Ashcamp, Kentucky. During the 12 months preceding issuance of the complaint, the Respondent, in the course and conduct of its business, sold and shipped from its Ashcamp facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky.

Accordingly, in agreement with the stipulation of the parties, we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization with the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. *Facts*

Since the Respondent's commencement of its operations in April 1991, the Union has been the designated exclusive representative of a bargaining unit of certain of the Respondent's employees. Such recognition has been embodied in a collective-bargaining agreement, the National Bituminous Coal Wage Agreement of 1988 (NBCWA), between the Respondent and the International Union, United Mine Workers of America, on behalf of its Locals and Districts, including the Union, which is effective by its terms for the period of July 1, 1988, to February 1, 1993.

The Respondent maintains a self-insured medical benefit plan, under which medical service providers submit bills on a periodic basis to the independent plan administrator. The plan administrator submits the bills to the Respondent on a weekly basis for payment. There is a period of delay between the time the service is rendered and the bill is paid, depending on the amount of time that the provider takes to bill for the service and the amount of time necessary for processing of the claim.

In approximately late October 1991, the Respondent issued a notice to its employees that the entire work force would be laid off as of December 20, 1991. Between the issuance of that notice and the December 20 shutdown and layoff, the Respondent and the Union met to discuss possible modifications of the NBCWA, but no agreement was reached.

On December 20, the Respondent ceased its operations, and all unit employees were permanently laid off. On January 7, 1992, the Respondent filed a Chapter 11 petition for bankruptcy in the United States Bankruptcy Court for the Eastern District of Kentucky. On January 10, 1992, the bankruptcy court awarded the Respondent interim relief from the labor agreement. Under this order, the Respondent was permitted

to reopen the mine and commence operations so as to allow the recall of unit employees on January 13, 1992. The bankruptcy court modified the terms of the NBCWA as it related to medical claims, medical insurance coverage, and accrued vacation and floating days for the year 1992.

During the period from December 20, 1991, until January 10, 1992, the Respondent's medical benefit plan remained in effect. However, since the Respondent's shutdown was common knowledge in the community, many providers were reluctant to accept the Respondent's insurance. When contacted to verify coverage, the Respondent, while not disclaiming coverage, indicated that it could not verify coverage.

Employee medical bills submitted for payment, concerning expenses occurred after December 20, 1991, have not been paid under the terms and conditions set forth in the NBCWA.[1] In addition, since at least October 1, 1991, through January 7, 1992, the Respondent has not provided sickness and accident benefits as provided for in the NBCWA. Further, since the December 20 shutdown, the Respondent has not paid the bargaining unit employees their accrued vacation and floating days for the year 1991 as provided for in article XIII of the NBCWA, or their accrued vacation and floating days for the year 1992 as provided under the original contract that were accrued before January 7, 1992. The Union did not consent to the cessation of these benefits by the Respondent.

B. *Contentions of the Parties*

The Respondent contends that its financial condition and business circumstances justified its actions in unilaterally ceasing to apply certain terms of the NBCWA. Specifically, the Respondent contends that, as of December 20, 1991, its debts exceeded its assets. During the period from December 20, 1991, until January 10, 1992, the Respondent contends that it was attempting to save its operation from permanent shutdown. Because there was a possibility that its operation could continue, the medical insurance plan was not terminated. However, the reopening of its operation and continuation of the medical plan was contingent on the granting of interim relief from the contract by the bankruptcy court. Hence, the Respondent adopted the stance of not disclaiming coverage but also not verifying coverage. The Respondent asserts that the only other alternative would have been to close down permanently and liquidate, thus exposing the employees to a permanent loss of insurance coverage. The Respondent thus contends that its actions were not taken to limit the rights of the employees under the contract or as a cost-saving device, but were taken to allow medical coverage to continue and to reduce the risk of unpaid claims falling on the employees.

The General Counsel contends that any such economic necessity does not excuse the Respondent's violation of Section 8(a)(5) of the Act by unilaterally abrogating and ceasing to apply basic and essential terms and conditions of the collective-bargaining agreement. While the General Counsel concedes that the Respondent had certain rights under *Bildisco & Bildisco v. NLRB*, 465 U.S. 513 (1984), to have the collective-bargaining agreement modified once it secured relief from an appropriate bankruptcy court, the subject of the instant complaint is conduct which occurred prior to the January 10 order granting relief. With regard to the medical insurance, the General Counsel contends that the failure of the Respondent to verify coverage under its medical insurance plan, when contacted by medical providers, amounted to a ''de facto cancellation of health insurance for its employees,'' and that while the Respondent's medical plan technically remained in effect, the Respondent's conduct had the effect of an actual cancellation of coverage.

C. *Discussion and Conclusion*

We find merit in the General Counsel's contentions. The contractual provisions at issue, i.e., health insurance, sickness and accident benefits, and accrued vacation and floating days, are mandatory subjects of bargaining. A unilateral modification or repudiation of such provisions during a contract term is a violation of Section 8(a)(5). *Rapid Fur Dressing*, 278 NLRB 905 (1986). As discussed above, the parties have stipulated that the Respondent unilaterally ceased applying those provisions of the NBCWA prior to the ruling of the bankruptcy court, and that the Respondent's only defense is that its financial condition justified its actions. It is well established, however, that economic inability to pay does not constitute an adequate defense to an allegation that an employer has violated Section 8(a)(5) by failing to abide by the provisions of a collective-bargaining agreement. *Crest Litho*, 308 NLRB No. 24 (July 31, 1992). Nor would benign motive excuse such action. Accordingly, we find that the Respondent has failed to present a meritorious defense to its unlawful conduct and that the Respondent has violated Section 8(a)(5) and (1) as alleged.

CONCLUSION OF LAW

By failing to continue in effect all the terms and conditions of its collective-bargaining agreement with the Union, i.e., by refusing to provide its employees with health insurance, accrued vacation and floating days, and sickness and accident benefits without having obtained the Union's consent to its failure to continue the contractual terms and conditions of employment, the Respondent has committed unfair labor prac-

[1] All medical claims for the period after January 7, 1992, have been paid under the terms of the contract as modified by the bankruptcy court.

tices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[2]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to give effect to the terms and conditions of its then-existing collective-bargaining agreement with the Union until January 7, 1992. We shall also order the Respondent to make whole unit employees, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), for any loss of wages and benefits suffered as the result of its unlawful repudiation of contractual provisions as well as for any medical bills they may have paid directly to health care providers that the contractual policies would have covered. Interest on amounts owing to unit employees shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Trojan Mining and Processing, Inc., Ashcamp, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with United Mine Workers of America, District 17, Subdistrict 4 as the exclusive bargaining representative of an appropriate unit of the Respondent's employees, by failing to continue in effect all the terms and conditions of its then-existing collective-bargaining agreement with the Union until January 7, 1992, by refusing to provide its employees with contractually provided health insurance, accrued vacation and floating days, and sickness and accident benefits.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Give effect to the terms and conditions of employment of its then-existing collective-bargaining agreement with the Union until January 7, 1992.

(b) Make whole, in the manner set forth in the remedy section of this decision, unit employees for any losses resulting from the Respondent's failure to continue in effect the terms and conditions of its then-existing collective-bargaining agreement with the Union until January 7, 1992.

(c) Post at its facility in Ashcamp, Kentucky, copies of the attached notice marked ''Appendix.''[3] Copies of this notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] As discussed above, the complaint alleges that the denial of health insurance began in October 1991. However, as noted above, the stipulated facts establish a violation only as of December 20. Accordingly, our remedy is based on the latter date. Conversely, the complaint alleges that the denial of sickness and accident benefits began on December 20, 1991. However, the stipulated facts show a violation as of October 1. Again, we have tailored the remedy to the stipulated facts.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to bargain in good faith with United Mine Workers of America, District 17, Subdistrict 4 as the exclusive bargaining representative of an appropriate bargaining unit of our employees, by failing to continue in effect all the terms and conditions of our then-existing collective-bargaining agreement with the Union until January 7, 1992, by refusing to provide unit employees with contractually provided health insurance, accrued vacation and floating days, and sickness and accident benefits.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL give effect to the terms and conditions of employment of our then-existing collective-bargaining agreement with the Union until January 7, 1992.

WE WILL make whole unit employees for any losses resulting from our failure to continue in effect the terms and conditions of our then-existing collective-bargaining agreement with the Union until January 7, 1992.

TROJAN MINING & PROCESSING